Appeal No. 2005AP239-AC **Cir. Ct. No. 2003FA451**

WISCONSIN COURT OF APPEALS
DISTRICT IV

SHERMAN D. RASCHEIN,

PETITIONER-APPELLANT,

V.

MELISSA S. FREY,

RESPONDENT-RESPONDENT.

FILED

JUN 30, 2005

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Dykman, Vergeront and Lundsten, JJ.

This appeal raises several related issues of first impression regarding the third-party visitation rights of a former foster parent following the adoption of the child by the foster parent's ex-wife shortly after the foster parents' divorce. The central questions presented are: (1) whether the divorce of foster parents qualifies as "a dissolution of a marriage" sufficient to trigger the visitation statute, WIS. STAT. § 767.245 (2003-04),[1] when one of the foster parents subsequently adopts the child; or if not, (2) whether a former foster parent whose ex-spouse has adopted the foster child has standing to raise an equitable visitation claim under ***Holtzman v. Knott***, 193 Wis. 2d 649, 533 N.W.2d 419 (1995). Due to the

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

statewide importance of the issues raised, as well as the need for expeditious resolution of a case that would otherwise present a likely candidate for a petition for review regardless of the outcome at this court, we certify this appeal to the Wisconsin Supreme Court for its review and determination pursuant to WIS. STAT. RULE 809.61.

BACKGROUND

On August 29, 2001, two days after his birth, Dalton D.F. was placed in foster care in the marital home of Sherman D.R. and Melissa S.F. Dalton resided with Sherman and Melissa and their marital child until shortly before Melissa filed for divorce in February of 2003. In accordance with a temporary order, Dalton alternated equal periods of physical placement with Sherman and Melissa throughout the divorce proceeding on the same schedule as the couple's marital child. Sherman and Melissa's divorce was finalized on October 9, 2003.

Meanwhile, the parental rights of Dalton's biological parents were terminated on July 16, 2003, and Melissa filed an adoption petition shortly thereafter. Sherman asserts that he did not file his own adoption petition because he relied upon written assurances from Melissa that she considered him Dalton's dad, from which he inferred that she would allow him continued visitation. Melissa finally adopted Dalton on November 10, 2003, and advised Sherman by letter several days later that she would no longer allow Dalton to visit Sherman. Sherman promptly filed a petition for visitation.

Melissa moved to dismiss the petition and both parties presented evidentiary materials and argument to the court. The guardian ad litem supported Sherman's petition, arguing that ***Holtzman*** should apply and that the court should

hold a hearing to determine whether third-party visitation would be in the best interest of the child. After considering the parties' submissions, as well as taking judicial notice of prior proceedings, the trial court granted the motion to dismiss without an evidentiary hearing. Sherman filed a motion for reconsideration, which was also denied following additional briefing and argument.

Sherman then appealed and sought relief pending appeal in the form of an order reinstating the temporary order for visitation. This court denied relief pending appeal, but decided to expedite consideration of the case.[2] On appeal, the guardian ad litem does not support Sherman's position, but instead, like Melissa, asks that we affirm the circuit court's order.

STATUTORY VISITATION

The first issue on appeal is whether Sherman can bring a statutory claim for visitation. WISCONSIN STAT. § 767.245(1) provides in relevant part:

> upon petition by a … person who has maintained a relationship similar to a parent-child relationship with the child, the court may grant reasonable visitation rights to that person if the parents have notice of the hearing and if the court determines that visitation is in the best interest of the child.

The Wisconsin Supreme Court has held that a prerequisite triggering event for standing to bring a visitation petition under § 767.245(1) is "the dissolution of a

[2] In our order denying relief pending appeal, we stated that Sherman had not had the right to visit the child since November of 2004, and had not shown that irreparable harm would result if his separation from the child were to continue somewhat longer. However, recognizing that Sherman's "separation from the child may be of consequence to his relationship to the child should he prevail on appeal," we decided to take the case under immediate submission upon completion of briefing.

marriage."[3] ***Holtzman***, 193 Wis. 2d at 680. The question here, then, is whether the divorce of foster parents satisfies the dissolved marriage prerequisite for standing.

In ***Holtzman***, the court concluded that the prerequisite for statutory visitation was not satisfied by the break-up of the relationship of two women who had been living in a close, committed relationship and raising a child together, because the child "was not born of a marriage or adopted during a marriage." ***Id.*** The child here was also neither a marital child nor adopted while the foster parents were still married. It therefore appears unlikely that Sherman can satisfy the standing prerequisite for a visitation claim under WIS. STAT. § 767.245(1).

EQUITABLE VISITATION

WISCONSIN STAT. § 767.245(1) is not the only available basis for a visitation petition, however. In ***Holtzman***, the court held:

> [A] circuit court has equitable power to hear a petition for visitation when it determines that the petitioner has a parent-like relationship with the child and that a significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent. To meet these two requirements, a petitioner must prove the component elements of each one. Only after the petitioner satisfies this burden may a circuit court consider whether visitation is in the best interest of the child.
>
> To demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation

[3] Contrary to arguments made by both parties and the guardian ad litem, it appears that ***Holtzman*** abandoned prior language referring to the triggering event as an "action affecting the family," and/or the "dissolving of an intact family," explaining at length why that language was too confusing. ***Holtzman v. Knott***, 193 Wis. 2d 649, 678-80 (1995).

> and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.
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> To establish a significant triggering event justifying state intervention in the child's relationship with a biological or adoptive parent, the petitioner must prove that this parent has interfered substantially with the petitioner's parent-like relationship with the child, and that the petitioner sought court ordered visitation within a reasonable time after the parent's interference. The petitioner must prove all these elements before a circuit court may consider whether visitation is in the best interest of the child.

Holtzman, 193 Wis. 2d at 694-95. Whether Sherman can raise an equitable visitation claim appears to present a much closer question than the statutory visitation issue.

Melissa and the guardian ad litem argue, and the circuit court held, that ***Elgin and Carol W. v. DHFS***, 221 Wis. 2d 36, 584 N.W.2d 195 (Ct. App. 1998) (otherwise known as ***Jeffrey A.W.***), precludes all claims for equitable visitation following an adoption, other than those explicitly authorized under

WIS. STAT. § 48.925 of the adoption statutes.[4] In ***Jeffrey A.W.***, this court held that the biological grandparents of a child who had been adopted by nonrelatives could not raise an equitable visitation claim under ***Holtzman***. We noted that the grandparents' relationship had been terminated by operation of WIS. STAT. § 48.92 upon the TPR proceeding, and stressed the importance of finality and stability following adoptions. 221 Wis. 2d at 47-48.

It is not clear whether the policy concerns underlying the decision in ***Jeffrey A.W.*** would support the same outcome here. To begin with, unlike the situation in ***Jeffrey A.W.***, the person petitioning for visitation here allegedly developed his relationship with the child with the consent of the adoptive parent, rather than with the consent of a biological parent whose rights were subsequently

[4] WISCONSIN STAT. § 48.925(1) provides:

> **(1)** Upon petition by a relative who has maintained a relationship similar to a parent-child relationship with a child who has been adopted by a stepparent or relative, the court, subject to subs. (1m) and (2), may grant reasonable visitation rights to that person if the petitioner has maintained such a relationship within 2 years prior to the filing of the petition, if the adoptive parent or parents, or, if a birth parent is the spouse of an adoptive parent, the adoptive parent and birth parent, have notice of the hearing and if the court determines all of the following:
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> (a) That visitation is in the best interest of the child.
>
> (b) That the petitioner will not undermine the adoptive parent's or parents' relationship with the child or, if a birth parent is the spouse of an adoptive parent, the adoptive parent's and birth parent's relationship with the child.
>
> (c) That the petitioner will not act in a manner that is contrary to parenting decisions that are related to the child's physical, emotional, educational or spiritual welfare and that are made by the adoptive parent or parents or, if a birth parent is the spouse of an adoptive parent, by the adoptive parent and birth parent.

terminated. Moreover, because the petitioner here is the biological father of his former foster child's adoptive brother and shares placement of that child with the adoptive mother, the petitioner will inevitably continue to have some degree of contact with his former foster child as well. As the petitioner points out, it may well be confusing and hurtful for the adopted child to see his brother go off to visit with the man the adopted child thought of as his own father for the first two years of his life.

On the other hand, as the guardian ad litem points out, foster parents may be involved in a large percentage of cases where children are later adopted. The very nature of the foster care system requires uncontested relinquishment of children when a permanent home is found. A general rule allowing former foster parents to petition for visitation could thus cause disruption to the adoption system, potentially allowing multiple foster parents to make visitation claims to the same child. Therefore, the resolution of this case could serve to clarify the interaction between foster care, adoption and visitation laws.

Assuming that equitable visitation may be available in some circumstances following an adoption, Melissa and the guardian ad litem argue that Sherman cannot meet the first ***Holtzman*** element of the parent-like relationship test here, because Melissa was not Dalton's adoptive parent *at the time* that she consented to his relationship with Sherman. Again, both parties raise valid points on this issue. On the one hand, it could be argued that Sherman actually developed his relationship with the child with the consent of the state, which initially placed the child in the couple's joint foster care, and that Melissa did not allow him to continue that relationship once she had the authority to deny it. On the other hand, it could be argued that Melissa agreed to Sherman's continued visitation after the parties separated and that the focus of the first element should

be the fact that Melissa and Sherman were acting as co-parents, rather than the timing of their co-parenting.

Melissa further contends that Sherman cannot meet the third element of the parent-like relationship test because he received financial compensation for providing foster care to Dalton pursuant to a contract with the state. Sherman counters that he no longer received foster placement compensation during the divorce proceedings, when all payments went to Melissa. Because no evidentiary hearing was held, it is unclear whether there is a sufficient factual basis to decide that issue on appeal without an additional stipulation from the parties.

Finally, Sherman also argues that barring him from raising an equitable visitation claim would violate equal protection principles and that Melissa should be equitably estopped from denying his claim for visitation. However, as Melissa points out, Sherman has cited no authority for an equal protection violation in any situation analogous to this one, and we are persuaded that the estoppel argument can be decided based on existing precedent. We certify these questions along with the central questions on appeal to facilitate the most expeditious resolution of this case.